DOCUMENT RESUME

ED 392 098 CS 509 192

AUTHOR Hanson, Jim
TITLE University Hate Speech Codes: Toward an Approach Restricting Verbal Attack.
PUB DATE 17 Nov 95
NOTE 7p.; Paper presented at the Annual Meeting of the Speech Communication Association (81st, San Antonio, TX, November 18-21, 1995).
PUB TYPE Viewpoints (Opinion/Position Papers, Essays, etc.) (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Censorship; Civil Rights; College Students; *Freedom of Speech; *Higher Education; Intellectual Freedom; Racial Bias; *Student Rights; *Universities
IDENTIFIERS First Amendment; Hate Speech; Politically Correct Communication; *Speech Codes; *University of Michigan

ABSTRACT

This paper reviews events leading to the University of Michigan speech codes, identifies the state of the law following the Doe v. the University of Michigan decision, points out problems in suggested alternatives to the code, and outlines an approach that protects students from hate speech while maintaining first amendment rights. The paper first provides a historical context for the consideration of speech codes by citing these events: (1) following a number of hateful acts at the University of Michigan, the United Coalition against Racism threatened to sue the university for not maintaining or creating a nonracist environment; (2) the university responded with a speech code, but the code was soon challenged in court by a biopsychology student who maintained that the code could sanction him for aspects of his research; and (3) federal courts ruled in favor of the student on the basis that the code was too broad and that university officials had attempted to enforce it in inappropiate situations. Noting that some have used the court's decision to argue against the implementation of any speech codes on college campuses, the paper argues that the problem is not speech codes in general but the inspecific nature of the Michigan code in particular. The paper concludes that alternatives to speech codes are not convincing, since verbally assaulted students are not in a position to fight back, especially if they do not feel the university stands with them against racism and hate. (Contains 53 references). (TB)

UNIVERSITY HATE SPEECH CODES: TOWARD AN APPROACH RESTRICTING VERBAL ATTACK

By Jim Hanson

For Freedom of Expression Commission
1995 Speech Communication Association Convention
November 17, 1995

Directly pitting the objectives of free speech and equality, our nation's universities have become the focal point of a growing debate about hate speech. The debate has been spurred on by an increasing number of racial, gender and sexual orientation attacks at universities across the country. In 1986, the University of Massachusetts witnessed 3,000 whites chasing, yelling and beating anyone who was black in their path following the world series.[1] Jewish students have been physically and verbally attacked in major incidences at Memphis State University, the University of Kansas, Rutgers University, and Brooklyn College.[2] Indeed, following a two year study of 161 institutions, Joan Weiss of the National Institute Against Prejudice & Violence, concluded that "in the course of [one] academic year, 20% of all minority students will be victim [sic] of some act of physical or verbal abuse motivated by prejudice."[3] The incidences have continued.[4]

While a sizable number of these acts constitute conduct which has never been protected per se (other than its communicative function), verbal abuse and name-calling constitute the most common form of university ethnoviolence.[5] For example, the Jewish Student Union at Memphis State University was spray-painted with swastikas and the words "Hitler is God."[6] The National Gay and Lesbian Task Force has reported increasing numbers of slurs and verbal harassment against gay and lesbian students,[7] including anonymous attacks at the University of Delaware which were left littered with graffiti including "Step Here, Kill a Queer" and "Stay in the Closet Fag."[8] In an excellent review of racial incidents, a student wrote of "graffiti containing swastikas and antiblack epithets; cross-burning; . . . the shouting of racial slurs; the distribution of openly hostile leaflets . . ." at American universities.[9]

As a result of these verbal attacks, a number of schools have attempted to initiate speech codes prohibiting the use of this kind of hateful symbolic expression.[10] Hate speech codes seek, in varying degrees, to restrict students from certain expressions which attack individuals for their gender, race, sexual orientation, and religious and political beliefs. In this paper, I will argue in favor of speech codes that restrict "fighting words," verbal attacks that inflict injury or provoke violence. Specifically, first, I review the events leading to the University of Michigan speech codes; second, I identify the state of the law following the Doe v. University of Michigan decision; third, I point out problems in suggested alternatives to and approaches to speech codes; fourth, I outline an approach that protects students from hate speech while maintaining students' right to engage in discussion in university and campus life.

THE UNIVERSITY OF MICHIGAN'S HATE SPEECH CODES

The most important example of the legal and public debate about student speech codes occurred at the University of Michigan. The school became alarmed at a growing number of racially insensitive incidents. At a black student organization meeting, someone inserted a flyer through the bottom of a door announcing "open season" on blacks, and called blacks "saucer lips, porch monkeys, and jigaboos."[11] The next month, a disk jockey on the campus radio station encouraged listeners to call in with their favorite racist jokes.[12] Then, a

---

[1]David Rosenberg, "Racist Speech, the First Amendment, and Public Universities: Taking a Stand on Neutrality," Cornell Law Review 76 (1991): 551.

[2]David Shenk, "Young Hate," The College Magazine CV (February, 1990): 34.

[3]Letter to Senator Art Torres cited in Hearing on Racial/Ethnic Tensions and Hate Violence on University of California Campuses, Senate Special Committee on University of California Admissions, Cal. Legislature (Oct. 4, 1988): 67-68.

[4]Alexander Cockburn, "Bush & P.C.--A Conspiracy so Immense . . .," The Nation (May 27, 1991): 690.

[5]Ellen E. Lange, "Racist Speech on Campus: A Title VII Solution to a First Amendment Problem," Southern California Law Review 64 (1990): 129.

[6]John T. Shapiro, "The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech," Minnesota Law Review 75 (1990): 203.

[7]As cited in Shapiro "The Call" 202.

[8]Shapiro, The Call" 206.

[9]Note, "Racism and Race Relations in the University," Virginia Law Review 76 (1990): 315 as cited in Peter Linzer, "White Liberal Looks at Racist Speech," St. John's Law Review 65 (1991): 188.

[10]Schools with some form of student speech code explicitly addressing hate forms of speech include, at least, Brown University, Emory University, Pennsylvania State University, Tufts University, Trinity College, the University of California, the University of Connecticut, the University of North Carolina at Chapel Hill, the University of Michigan (now under an interim policy), the University of Pennsylvania, and the University of Wisconsin, and even our own University of Southern California per Shapiro, "The Call" 202, footnote 9.

[11]These descriptions come from Justice Avern Cohn's description in Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989): 854.

[12]See Dinesh D'Souza, Illiberal Education (New York, New York: Vintage Books, 1992) 138.

demonstration protesting these incidents was greeted by a Ku Klux Klan uniform hanging from a dormitory room.[13]

Many students and the administration became alarmed and sought to stop these ongoing racist incidents. Like most student speech codes established at other schools, University of Michigan students sought to pressure the administration to develop standards restricting hateful speech.[14] Dinesh D'Souza has argued that American campuses have become so infused with "Political Correctness" that students and professors feel concerned to discuss some issues without the fear that other students will call them "racist," "sexist," or "homophobic," among other names.[15] While D'Souza's claims are unquestionably overstated,[16] his point that students are being challenged and even sanctioned for insensitive speech is correct. A culture of sensitivity has grown on campuses and students are willing to challenge those they believe are insensitive.

Specifically, at the University of Michigan, the campus group United Coalition Against Racism (UCAR) was not satisfied with the University administration's actions giving the Black Student Union $35,000, hiring more black faculty and successfully encouraging greater numbers of ethnically diverse students for the incoming frosh class. As a result, the UCAR announced that they would sue the university "for not maintaining or creating a non-racist, non-violent atmosphere" on campus.[17] Students brought in Jesse Jackson and pressured the administration to take action on insensitive speech.[18] The university reacted swiftly and set out to codify standards of appropriate symbolic behavior in "educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers"[19] based on student concerns. Specifically, the University established guidelines which proportionately punished students[20] for:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status . . .
> 2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation[21]
> where such behavior:
> a) threatens,
> or b) has the "reasonably foreseeable effect" of interfering with
> or c) creates an intimidating or hostile environment for an individual's safety, work, study, or school related activities.[22]

In 1989, a biopsychology student, choosing to name himself John Doe set out to challenge the codes with the ACLU's assistance. "Doe" felt that discussing biopsychology theories, which examine the relationship between traits of groups of people and genetic factors like race and gender would be subject to sanction by the codes. For example, one biopsychology line of research maintains that blacks are less spatially capable than whites. Doe felt discussion of these theories would be inhibited and subject to penalty and filed to have the speech code eliminated.

Avery Cohn, a federal circuit court judge, ruled in favor of Doe arguing that the University's regulations were vague and overly broad. In his decision, Cohn pointed out that the constitution prevents the banning of merely offensive speech and that the school's code never distinguished between offensive and what it called "stigmatizing" and "victimizing" speech. Indeed, Cohn noted:

> During the oral argument, the Court asked the University's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which "stigmatizes or victimizes" on the basis of an invidious factor. Counsel replied "very carefully." This response, while refreshingly candid, illustrated the plain fact that the

---

[13]Again, see Cohn's description in Doe v University of Michigan 854.

[14]See D'Souza, Illiberal Education most particularly pages 124 through 156.

[15]D'Souza, Illiberal Education.

[16]For balanced and thorough attacks on D'Souza, see Mike Kinsley, "Hysteria Over Political Correctness: Where's this left-wing reign of terror on campus?," The Washington Post 3 May 1991: A25; and Tim Brennan, "PC and the decline of the American Empire," Social Policy 22 (1991): 16-29. For more pointed attacks, see Stanley Fish, "Free Speech never existed and it's a good thing too," in Debating PC: The Controversy over Political Correctness on College Campuses ed. by Paul Berman (New York, New York: Dell Publishing, 1992) and Cockburn "Bush & PC" 685-704.

[17]As stated in Doe v University of Michigan 854.

[18]See D'Souza, Illiberal Education 138-141.

[19]As noted in Doe v University of Michigan 856.

[20]The University required extensive hearings, full appeals, and many due process rights to those accused of violating the code. The University also established 8 possible sanctions dependent on the intent and number of offenses of the student including: 1) formal reprimand; 2) community service; 3) class attendance; 4) restitution; 5) removal from University housing. 6) suspension from specific courses and activities 7) suspension; 8) expulsion (penalties 7 and 8 were reserved only for violent or dangerous acts).

[21]As noted in Doe v University of Michigan 856.

[22]As noted in Doe v University of Michigan 856. On August 22, 1989, the University withdrew its code--without explanation other than "a need exists for further explanation and clarification of the policy."

> University never articulated any principled way to distinguish sanctionable from protected speech.[23]

Cohn discussed existing first amendment law to emphasize that the code was not permissable. He argued that the code, "had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed."[24] He also emphasized that the University could not "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people."[25]

THE LAW AFTER DOE V MICHIGAN

Reactions to the court's decision have focused on the court's rejection of speech codes. Carol W. Napier, for example, argues that the decision makes any restrictions on hate speech a very difficult proposition.[26] She argues that instead of emphasizing codes, those dedicated to equal rights in schools should focus on the "root" causes of racism and sexism and implement affirmative action programs and sensitivity courses.[27] A Harvard Law Review note went even further when it argued that the decision's overly abstract and categorical approach to the law prevents virtually any speech code concern for the countervailing objectives of equality and freedom.[28]

While I agree that Cohn's decision makes the constitutionality of speech codes more problematic, I do not agree that the decision prevents speech codes. I agree with John T. Shapiro who points out that Cohn's problem with the Michigan speech code was that it was impermissibly vague and overbroad.[29] In fact, I would go further than Shapiro. Cohn's problem wasn't with the codes themselves, per se. Rather, as Cohn argues in the decision:

> Were the Court to look only at the plain language of the Policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement.[30]

The problem, Cohn argued, rested in the "legislative history, the Guide, and experiences gleaned from a year of enforcement."[31] The legislative history included memos in which school lawyers indicated little concern for free speech. The Guide (which was recalled without explanation by the School) featured numerous examples of protected speech which it claimed were subject to sanction including restrictions on comments like "Women just aren't as good in this field as men." The enforcement experience included an incident in which a student was counseled for repeating his black roommate's allegation that, "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."[32] These three factors led Cohn to argue that the school did not have a clear definition of what constituted victimizing and stigmatizing speech when using the codes.[33] If the policy had been more clear about what constituted victimizing and stigmatizing speech and had done so with a focus away from legitimate classroom discussion, Cohn would have ruled in favor of the University. Indeed, the failure to articulate what would be stigmatizing and victimizing is the only section in which Cohn questions the codes themselves.[34]

PROBLEMS WITH ALTERNATE SUGGESTIONS TO SPEECH CODES

In the aftermath of the court's decision, scholars have advanced a wide variety of counterproposals to address the student speech code issue. In this section, I consider alternatives, including libertarian, alternative response, contextual, fighting words, and harassment approaches.

The libertarian approach rejects the use of codes as an infringement of free speech ideals.[35] David F. McGowan and Ragesh K. Tangri, for example, argue that codes restrict an university's primary responsibility to be a thriving marketplace of ideas and that colleges serve a unique function in permitting a full airing of and

---

[23]Cohn Doe v University of Michigan 867.
[24]Cohn Doe v University of Michigan 863.
[25]Cohn Doe v University of Michigan 863.
[26]Carol W. Napier, "Can Universities Regulate Hate-Speech After Doe V University of Michigan?," Washington University Law Quarterly 69 (1991) 991 - 998.
[27]Napier, "Can Universities" 998.
[28]Note, "First Amendment--Racist and Sexist Expression on Campus--Court Strikes Down University Limits on Hate Speech--," Harvard Law Review 103 (1990) 1397-1402.
[29]Shapiro, "The Call" 218.
[30]Cohn in Doe v University of Michigan 859.
[31]Cohn in Doe v University of Michigan 859.
[32]Cohn in Doe v University of Michigan 866.
[33]Indeed, after writing the decision, Cohn added at the end of his decision, a comment about Mari Matsuda's piece, "Public Response to Racist Speech: Considering the Victim's Story." (Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," Michigan Law Review 87 (1989): 2374.) He argued that, "An earlier awareness of Professor Matsuda's paper certainly would have sharpened the Court's view of the issues." (Cohn in Doe v University of Michigan 869.) In my opinion, the court would be assisted best by identifying what speech can and cannot be restricted.
[34]See Cohn in Doe v University of Michigan 859 and 867.
[35]See also, Linzer "White Liberal," and Robert ·· McGee, "Hate Speech, Free Speech and the University," Akron Law Review 24 (Fall, 1990): 363-392.

exchange of ideas.[36] While there is much to be said about free expression--there is not much to be said about the kind of speech that a carefully tailored hate speech code would attempt to restrict. Adding hate speech restrictions to the existing first amendment exceptions--or even alone as the one exception--does not threaten the exchange of ideas that McGowan, Tangri, I and other civil libertarians value.

As an addition to existing exceptions, hate speech restrictions present little if any unique danger of an avalanche of first amendment restrictions. On the contrary, existing standards restricting obscene speech, including, for example, California v. Miller's "reasonable person" and "prurient interests" language, could easily be used by a court hostile to free speech interests--not to mention the recent court decision on abortion restricting a counselor's right to tell women that they may have an abortion.[37] The addition of hate speech categories present no unique danger--particularly if hate speech is clearly distinguished from protected speech.

Even alone, restrictions, narrowly tailored, do not endanger speech critical to the exchange of ideas. Contrary to the view that "all speech is deserving of protection," there is little value in hate speech. Just as there is little value (and much danger) in the oft-cited shouting of "fire" in a crowded theater, there is minimal value in allowing someone to call another person a "fag," "nigger," "cunt," or some other epithet. Particularly in the context of the classroom and university environment, such comments inhibit the free flow of ideas to such a degree as to prevent a full discussion in the classroom.[38] In addition, hate filled symbolic attacks devalue and threaten other human beings and endanger their constitutionally protected right to equal education opportunity. Even McGowan and Tangri concede this point as did Cohn in his decision.[39]

Free speech supporters have also advocated alternative actions instead of speech codes. For example, Carol Napier argues that we need sensitivity courses and increased affirmative action.[40] I do not disagree with these approaches. However, alone, they do not address situations in which verbal attack does occur. Indeed, a lack of hate speech codes renders these alternative policies less effective because students and professors who denigrate others are never officially chastised. Instead, those these programs seek to "include" are kept constantly in threat of being "excluded." Only a code can give the university the ability to address directly the problem of victimization from verbal assaults that do happen despite the best efforts of sensitivity courses and affirmative action programs.

Another alternative suggestion to the codes is for the victims to just argue back against the intolerance. There are three problems with this approach. First, this does not work. Often, victims of these attacks do not feel able to respond. Instead, they feel threatened, humiliated and powerless.[41] Second, the university's failure to act as an institution against the speech gives the appearance that the university accedes to the activity--that the activity is within the academic realm of propriety and free expression. As a result, those attacked feel they are alone in a world of hate.[42] Third, it assumes that individual response helps--when in fact, this is an ongoing community problem in which attacks are made based on society's worst white, heterosexual, male bigotry. The racist, the sexist, the homoist is not interested in dialoguing[43]--they are interested in devaluing, and threatening, using what Wayne Brockriede and Douglas Ehninger have called "argument by rape."[44]

As a result, I believe that student speech codes are a necessary action. But not just any speech code will do, as Justice Cohn's decision pointed out. Instead, we need a clearly articulated distinction between protected and unprotected speech. One approach which exhibits a failure to make this distinction has been to tie codes in with a contextual approach to the first amendment. Contextual approaches focus on the overly categorizing nature of the Doe v. Michigan decision and instead advocate a situational approach to the law. This approach has some appeal--after all, no law will account for all the situations for which it is designed to

---

[36]David F. McGowan and Ragesh K. Tangri, "A Libertarian Critique of University Restrictions of Offensive Speech," California Law Review 79 (May 1991): 825-914.

[37]California v. Miller decision and Abortion Counseling Decision Citation.

[38]For a full discussion of this issue, see David Kretzmer, for example, who has argued that: 1. Racist speech does not equal self-enhancement; 2. Racist speech does not equal a dialogue/truth--they seek to stifle; 3. Racist speech does not help democracy--it stifles equality; 4. Racist speech does not equal a safety valve--rather, it increases anger/bad action. See David Kretzmer, "Free Speech and Racism" Cardozo Law Review 8 (1987): 445-453.

[39]See McGowan and Tangri, "A Libertarian," where, after a painfully tortured extension of an economic "marketplace" of free speech metaphor, they finally admit that, "the cost we speak of represents feelings of humiliation, degradation, and alienation." (897). Cohn points out that some speech might be "inherently distracting" (867).

[40]See, for example, Napier, "Can Universities," 991 - 998.

[41]Nor should we expect any different response given that the institution of which they seek to be a part is not willing to protect them and instead leaves the matter up to them to address.

[42]See Matsuda, "Public Response," 2370.

[43]To the degree that they are seriously interested in discussing the issues they raise, rather than making attacks--they should not be subject to sanction.

[44]Wayne Brockriede and Douglas Ehninger, Decision by Debate (New York, New York: Harper and Row, Publishers, 1978): 30-33.

account.[45] However, the approach leaves the courts with no clear standards for deciding how to assess specific situations. Mary Ellen Gale does the most thorough job of pointing out how the categorical approach to first amendment cases leaves little room for real consideration of the competing interest of equal educational rights and participation in university life.[46] While Gale provides eight particular situations in which to see how her contextual balancing approach would work--she never explicitly identifies how the court should go about judging future similar and dissimilar cases. The result is that judges are left without a principled way of contextualizing and balancing free speech and equal opportunity interests in specific cases. Indeed, a lack of principles for determining how to contextualize the codes was the exact reason that Cohn refused to rule in favor of the Michigan speech codes. While contextual approaches may indeed be appropriate--particularly in adjudicating what kind of speech has occurred--judges need principles upon which to identify distinctions between types of speech so they can properly weigh competing concerns of equality opportunity and free expression. Otherwise, we leave first amendment law to the whims of justices--thereby seriously endangering the first amendment protections of expression.

Another approach, that is still problematic, is the attempt to link hate speech codes with sexual harassment policies. This approach makes harassing speech that creates hostile environments subject to university restriction.[47] Unfortunately, harassment approaches do not identify how to distinguish clearly what constitutes hostile environments from non-hostile environments in the context of university settings. This is particularly unfortunate because the analogy between the power that a boss has over workers as opposed to the power that fellow students and dorm residents have over another student is somewhat problematic. Indeed, the courts have allowed harassment suits only when employment settings are the scene of constant harassment.[48] Unfortunately, proving this would be almost impossible in the university setting because most students face attacks by various individuals at various times--not enough to meet the demanding standards courts have set in sexual harassment cases.

A CLEARLY DISTINGUISHED APPROACH TO HATE SPEECH CODES

Instead of focusing on problematic analogies to sexual harassment, we need an approach that addresses the very real problem that Justice Cohn faced in his decision--the inability to distinguish protected from unprotected speech. I believe an approach restricting verbal hate attacks based on the fighting words doctrine would meet this objective. This approach stipulates that any code include essentially the following:

1. That the speaker's comments be directed at specific students or an identifiable group of students.
2. That the speaker's comments be all of the following:
    a. with the primary intention to be destructive of another specific student or identifiable group based on their race, gender, sexual orientation, other oppressed group status, or general status as a human being and not as part of engaging in classroom dialogue AND
    b. creative of an environment between the speaker and the specific student or identifiable group of students which is hostile to the affected student or group of students general participation in their university activities necessary to completing their education.
    c. constitute words that provoke violence or inflict injury.
3. That the speaker's comment be made in a situation in which the affected students needed to attend or participate in order to complete their education--including in a classroom, a school sponsored academic event, dormitory, and reasonably unavoidable areas of school necessary for moving through, eating in, studying or participating in university life.
4. University action to address the offending students shall provide full due process rights and shall focus on remedial action including discussion and sensitivity training.[49] Expulsion and suspension should occur only in the most grievous of offenses.

This approach makes very clear that only those students who use speech as a means of harassing other students are subject to sanction..[50] As in the Michigan codes, they are free to make the "hate" comments in

---

[45]See, for example, Lief Carter's excellent approach to addressing the law to specific situations in his book Contemporary Constitutional Lawmaking: The Supreme Court and the Art of Politics (New York, New York: Pergamon Press, 1985).

[46]Mary Ellen Gale, "Reimagining the First Amendment: Racist Speech and Equal Liberty," St. John's Law Review 65 (1991): 119-185; see especially 175-185.

[47]See, for example, Ellen E. Lange, "Racist Speech on Campus: A Title VII Solution to a First Amendment Problem," Southern California Law Review 64 (1990): 129; and John Shapiro, "The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech," Minnesota Law Review 75 (1990): 201-238..

[48]See Shapiro, "The Call," footnote 106 on page 223.

[49]The University of Michigan codes do an admirable job of giving due process to those accused and should serve as a guide for other schools.

[50]For support concerning a policy focused on the fighting words doctrine, see Chad Baruch, "Dangerous Liaisons: Campus Racial Harassment Policies, the First Amendment, and the Efficacy of Suppression," Whittier Law Review 11 (1990): 697-

other situations when the object or objects of their hate are not directly attacked and have the full opportunity to remove themselves from such speech.

Restrictions on "Verbal Hate Attacks" would have many benefits. First, this approach would give groups a symbol of institutional, university support for their right to be on campus free from direct bigoted attack. Students could now report incidences not just of bigoted conduct--but also specific kinds of bigoted speech. As Mari Matsuda has argued, this kind of institutional support in the face of ethnoviolence can be incredibly empowering to those who frequently feel left out of the system.[51] Coupled with Richard Delgado's suggestion that victims of serious and ongoing slurs be compensated via tort action, such an approach can provide real deterrence and remedy.[52] For those subject solely to university sanction, the process can open a dialogue about how to treat other human beings better.

Second, restrictions on verbal hate attacks would give students unrestricted right to express ideas as long as they are part of academic dialogue--thus, maintaining the "marketplace of ideas." Students and even professors can still express "repugnant," even discriminatory ideas as part of the university dialogue. This dialogue, however, will take place in the context of discussion--not in the context of threat of verbal attack. In addition, those students who do wish to make other kinds of attacks are free to do so in school newspapers, fliers, and in speeches in areas designated reasonably to be out of the paths of student lives.[53]

Most importantly, the rules offer clear guidelines about which speech is protected and which is not. While university officials and judges are free to examine the context in which the speech occurred (and indeed should do so)--their assessment of what constitutes protected as opposed to unprotected speech will be guided by clear principles. Speech directed at general groups of people, speech in non-essential to university life areas, speech intended as part of educational dialogue, speech which does not create hostile environments between students necessary to university life, and speech that does not constitute a direct attack against an individual that would provoke violence or inflict injury would all still protected. Only a specific category of speech is subject to sanction.

CONCLUSION

The debate about the proper balance between the objectives of free speech and equal opportunity when the two come into conflict will continue. As we continue this debate, we should avoid taking an absolute approach toward either objective. If we adhere to the objective of free speech absolutely we risk disempowering those who today face increasing intolerance and attack. On the other hand, if we adhere to the objective of equal opportunity absolutely we risk silencing important voices that offer new, useful insights on our world. In the process of our balancing, however, we must act in a principled manner. An approach toward hate speech codes which restricts attacks emphasizes the best of what free speech represents--open dialogue--while protecting and empowering those subject to the worst of what free speech represents--hateful, verbal attack.

---

721. Note, that despite arguments to the contrary, the Supreme Court has affirmed the fighting words doctrine, including in its RAV v St. Paul decision. It is true that the court has not ruled favorably in any fighting words doctrine cases since the original Chaplinsky decision. However, in each case, the problem was the vagueness and overbroadness of the statutes--not the fighting words doctrine itself. The doctrine remains good law.

[51]Matsuda, "Public Response 2372.

[52]See Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," Harvard C.R.-C.L Law Review 17 (1982): 133; and "Campus Antiracism Rules: Constitutional Narratives in Collision," Northwest University Law Review 85 (1991): 343.

[53]Within the university's scheduling system, students wishing to espouse views contrary to the policy may establish meetings in these pathways and express their views. This is entirely within Justice Cohn's and first amendment law's approval of time, place and manner restrictions on speech.